IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 3RD JANUARY 2007 / 13TH POUSHA, 1928

CRL.A.No. 1872 of 2003()

AGAINST THE JUDGEMENT IN CC.621/2000 of JUDL.MAGISTRATE OF FIRST CLASS-I, ALUVA

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APPELLANT: COMPLAINANT.

JAYAPRAKASH, EYAPILLIL HOUSE,
VIDAKKUZHA, THAIKKATTUKARA PO.
ALUVA.

BY ADV. SRI.K.S.MOHAMED HASHIM

RESPONDENTS: ACCUSED & STATE

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1. DEEPAK, S/O.O.R.THANKAPPAN,
THIRUVONAM, AKG ROAD, EDAPPALLY P.O.
EDAPALLY, ERNAKULAM DISTRICT.

2. STATE OF KERALA REP. BY]
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY ADVS. SRI.DEEPU THANKAN -R1
SMT.DEEPA DEEPU THANKAN
PUBLIC PROSECUTOR SRI. C.M.NAZAR -R2

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

CRL. APPEAL NO. 1872 OF 2003

Dated this the 3rd day of January, 2007

JUDGMENT

The appellant is the complainant in C.C. No.621 of 2000 on the file of the Judicial First Class Magistrate's Court I, Aluva. The above Calendar Case was on the basis of the complaint filed by the appellant alleging that the first respondent herein committed offences punishable under Section 138 of the Negotiable Instruments Act, 1881(hereinafter referred to as "the Act") and Section 420 I.P.C.

2. The case of the appellant was that the first respondent borrowed from him an amount of Rs.1,75,000/- and issued Ext.P1 cheque bearing No.560138 dated 10.2.2000 drawn on the State Bank of India, Ernakulam Broadway Branch towards discharge of the said liability which when presented to the bank for encashment was dishonoured with the endorsement " account closed". On receipt of intimation from the bank, the appellant caused a lawyer's notice to the first respondent demanding the amount covered by the cheque. Since the first respondent did not pay the amount inspite of the notice, the appellant filed the complaint stating

that **" the accused has given the cheque without sufficient funds in his bank account to honour the cheque. Not only that he issued the cheque to a closed account. The issuance of a cheque to a closed account was only to cheat the complainant. Thus the accused has committed the offence punishable under section 138 of Negotiable Instruments Act, 1881 as amended by Act 66 of 1988 and under section 420 of Indian Penal Code."**

3. The trial court took cognizance of the complaint and issued summons to the first respondent and trial started on appearance of the first respondent. During the pendency of the trial, the complainant filed a petition to drop the complaint under Section 138 of the Act and to confine only to Section 420 I.P.C. That petition was allowed and the court below proceeded against the first respondent for the offence punishable under Section 420 I.P.C. Subsequently, the appellant - complainant filed another application to alter the penal section and to prosecute the first respondent under Section 138 of the Act. The said application was dismissed by the court below on the ground that further alteration would amount to review of the earlier order which is not permissible under law. Thus the court below proceeded against the first respondent for the offence punishable under Section 420 I.P.C. To prove the case against the first respondent,

the appellant - complainant was examined as PW.1 and Exts.P1 to P7 were produced. The trial court found that the evidence adduced by the appellant was not sufficient to prove the case against the first respondent under Section 420 I.P.C. Hence, by judgment dated 30.7.2003, the trial court acquitted the first respondent. The above judgment is under challenge in this appeal.

4. The main grounds urged by the learned counsel appearing for the appellant are (i) the trial court went wrong in not proceeding against the first respondent under Section 138 of the Act as per the principles laid down by this Court in the decisions reported in **Vathsan v. Japahari, 2003(3) K.L.T. 972** and **Salim v. Thomas, 2004(1) K.L.T. 816** and (ii) the trial court went wrong in acquitting the first respondent as the evidence adduced by the appellant was sufficient to hold that the first respondent committed offence punishable under Section 420 I.P.C. This Court also heard the learned counsel appearing for the first respondent.

5. The allegation in the complaint filed by the appellant was that the first respondent committed offences punishable under Section 138 of the Act and Section 420 I.P.C. However, the appellant had filed a petition to proceed against the first respondent only under Section 420 I.P.C.

Hence, the court below proceeded against the first respondent for the offence under Section 420 I.P.C. It has also come out in evidence that the appellant filed another application subsequently to alter the penal section and to proceed under Section 138 of the Act. That application was dismissed by the court below. Dismissal of the above application is still in force unchallenged by the appellant. Even though as per the principles laid down in the judgments referred to above, dishonour of a cheque due to closure of account will amount to an offence under Section 138 of the Act, the appellant had given up such a case. In the above circumstances, this Court is of the view that only on the basis of the principles laid down in the above decisions, the court below cannot be found fault with for not proceeding under Section 138 of the Act. The first contention of the learned counsel for the appellant is, therefore, not tenable.

6. With regard to the second contention, the trial court considered the evidence adduced by the appellant and found that the appellant failed to prove the case against the first respondent under Section 420 I.P.C. If the evidence adduced by the complainant does not disclose an offence under Section 420 I.P.C., then the accused should be acquitted due to lack of evidence. Even before this Court, learned counsel appearing for the appellant only submits that issuance of a cheque on closure of account

amounts to an offence under Section 420 I.P.C., but no evidence is adduced to show that at the time of issuance of Ext.P1 cheque, the first respondent had any intention to cheat the appellant. That apart, learned counsel appearing for the first respondent submits that the reply given by the first respondent to the notice issued to him would show that no amount was borrowed by the first respondent at the time of issuance of the cheque in question. On an overall appreciation of the entire evidence, this Court is of the view that the judgment under challenge does not require any interference.

The Crl. Appeal fails and it is accordingly dismissed.

(K.THANKAPPAN, JUDGE)

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